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16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA

18 CARL PHILLIPS, individually, and on behalf of  
19 all others similarly situated,

20 Plaintiff,

21 v.

22 SEARS, ROEBUCK AND COMPANY; DEERE  
23 & COMPANY; TECUMSEH PRODUCTS  
COMPANY; PLATINUM EQUITY, LLC;  
24 BRIGGS & STRATTON CORPORATION;  
KAWASAKI MOTORS CORP. USA.; MTD  
25 PRODUCTS INC; THE TORO COMPANY;  
AMERICAN HONDA MOTOR COMPANY,  
26 INC.; ELECTROLUX HOME PRODUCTS,  
INC.; HUSQVARNA OUTDOOR PRODUCTS,  
27 INC.; and THE KOHLER COMPANY,

28 Defendants.

Case No.

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

1 Plaintiff, by his undersigned counsel, on behalf of himself and a Class of those  
2 similarly situated, bring this action against Defendants and alleges based upon personal  
3 knowledge of the allegations pertaining to himself, and upon information, belief, and the  
4 investigation of counsel as to all other allegations.

5 **I. NATURE OF THE CASE**

6 1. For more than a decade, Defendants have lied to consumers by overstating  
7 the horsepower of lawn mower engines. In advertising and selling their lawn mowers and lawn  
8 mower engines, Defendants have defrauded the public by: 1) misrepresenting and significantly  
9 overstating the horsepower produced by such products; 2) concealing, suppressing and failing to  
10 disclose material information, including the true, significantly lower horsepower of Defendants'  
11 products; and 3) falsely advertising and selling lawn mowers at different prices containing  
12 identical engines that produce the same horsepower as different products with different  
13 horsepower labels or ratings—higher prices for falsely represented higher horsepower—while  
14 concealing, suppressing and failing to disclose material information, including the facts that the  
15 engines are identical and the true, significantly lower horsepower of the lawn mowers. Plaintiff  
16 asserts claims for violations of the California Business and Professions Code, the California  
17 Consumers Legal Remedies Act, as well as common law unjust enrichment and conspiracy.  
18 Defendants have agreed and conspired among themselves to misrepresent and conceal material  
19 facts concerning the horsepower of other Defendants' lawn mowers and lawn mower engines,  
20 while misrepresenting, significantly overstating and concealing the true horsepower of  
21 Defendants' own lawn mowers and lawn mower engines.

22 2. Plaintiff brings this action on behalf of himself and a Class of similarly  
23 situated consumers who purchased lawn mowers with engines sold or manufactured by  
24 Defendants. Plaintiff, for himself and for the Class, seeks compensatory damages for the injuries  
25 caused by Defendants' unlawful conduct, such additional monetary relief as allowed under the  
26 statutory consumer and common laws of California, punitive damages, injunctive and other  
27 equitable relief and costs of suit and reasonable attorneys' fees.  
28

1                   3.       Plaintiff brings these claims on behalf of himself and a California statewide  
2 Class of similarly situated persons who purchased a lawn mower containing a gas combustible  
3 engine up to 30 horsepower that was manufactured or sold by a Defendant.

4       **II. JURISDICTION AND VENUE**

5                   4.       This Court has personal jurisdiction over the Defendants. The Court has  
6 jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d). Defendants  
7 have transacted business and their affairs in California and have committed the acts complained  
8 of in California. The amount in controversy exceed \$5,000,000.00.

9                   5.       Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b),  
10 (c), and (d) because a substantial part of the events giving rise to Plaintiff's claims occurred in  
11 this district. Defendants have transacted business and their affairs in this district and have  
12 committed the acts complained of in this district.

13       **III. PARTIES**

14           **A. Plaintiff**

15                   6.       Plaintiff Carl Phillips resides within this judicial district at 512 Laramie  
16 Way, Vacaville, California 95688. In approximately July 2003, Mr. Phillips purchased a Lawn  
17 Machine lawn mower at retailer Lowe's, located in Vacaville, California, which was  
18 manufactured by MTD and contained a purported, labeled 6 horsepower engine manufactured by  
19 Briggs & Stratton Corporation. Mr. Phillips paid approximately \$179 for the lawn mower.

20           **B. Defendants**

21                   7.       Defendant Sears, Roebuck and Company ("Sears") is a corporation with its  
22 headquarters located at 3333 Beverly Road B-5 317A, Hoffman Estates, Illinois. Sears sells lawn  
23 mowers under its brand name, Craftsman, which are manufactured by Electrolux Home Products,  
24 Inc. During the Class Period, Sears' Craftsman lawn mowers have contained engines  
25 manufactured by Tecumseh Products Company, Briggs & Stratton Corporation, The Kohler  
26 Company, and American Honda Motor Company, Inc. Sears also sells certain other brands of  
27 lawn mowers in addition to its Craftsman lawn mowers. Sears advertises, markets and sells  
28 Craftsman lawn mowers throughout the United States, including in California.

1                   8. Defendant Deere & Company (“Deere”) is an Illinois corporation with its  
2 headquarters located at One Deere Place, Moline, Illinois. During the Class Period, Deere has  
3 installed in its lawn mowers engines manufactured by Defendants Briggs & Stratton Corporation,  
4 American Honda Motor Company, Inc., Kawasaki Motors Corp. USA, and The Kohler Company.  
5 Deere advertises, markets and sells lawn mowers throughout the United States, including in  
6 California.

7                   9. Defendant Tecumseh Products Company (“Tecumseh”) is a corporation  
8 with its headquarters located at 100 East Patterson Street, Tecumseh, Michigan. During the Class  
9 Period, Tecumseh has manufactured engines for installation in lawn mowers sold by Defendants  
10 Sears, Electrolux Home Products, Inc., MTD Products Inc, and The Toro Company. Tecumseh  
11 manufactures engines that are installed in lawn mowers advertised, marketed and sold throughout  
12 the United States, including in California.

13                  10. Defendant Platinum Equity, LLC (“Platinum”) is a California company  
14 with its headquarters located at 360 North Crescent Drive, South Building, Beverly Hills,  
15 California 90210. Platinum acquired Defendant Tecumseh’s engines division in November 2007.  
16 During the Class Period Platinum manufactured engines that are installed in lawn mowers  
17 advertised, marketed and sold throughout the United States, including in California.

18                  11. Defendant Briggs & Stratton Corporation (“Briggs & Stratton”) is a  
19 corporation with its headquarters located at 12301 West Wirth Street, Wauwatosa, Wisconsin.  
20 During the Class Period, Briggs & Stratton manufactured engines for installation in lawn mowers  
21 sold by Defendants Sears, MTD Products Inc, Electrolux Home Products Inc., Deere and The  
22 Toro Company. Briggs & Stratton has acquired certain assets of original equipment  
23 manufacturers and is engaged in the manufacturing and sale of certain lawn mowers. Specifically,  
24 in June 2004, Briggs announced its acquisition of Simplicity Manufacturing, Inc., which is  
25 headquartered in Port Washington, Wisconsin. In October 2002, Simplicity acquired Snapper,  
26 Inc., a Georgia manufacturer of lawn mowers and other outdoor products. Briggs & Stratton  
27 manufactures engines that are installed in lawn mowers advertised, marketed and sold throughout  
28

1 the United States, including in California. Briggs & Stratton advertises, markets, and sells its  
2 own brand of lawn mowers throughout the United States, including in California.

3 12. Defendant Kawasaki Motors Corp. USA (“Kawasaki”) is a corporation  
4 with its corporate headquarters located at 9950 Jeronimo Road, Irvine, California. During the  
5 Class Period, Kawasaki manufactured engines for installation in lawn mowers sold by Defendants  
6 Deere, MTD Products Inc, Electrolux Home Products, Inc., and The Toro Company. Kawasaki  
7 manufactures engines for installation in lawn mowers advertised, marketed and sold throughout  
8 the United States, including in California.

9 13. Defendant MTD Products Inc (“MTD”) is a corporation with its  
10 headquarters at 5965 Grafton Road, Valley City, Ohio. MTD manufactures lawn mowers under  
11 the brand names Cub Cadet, Troy Bilt, Yard-Man, Yard Machines, Bolens and White Outdoor.  
12 During the Class Period, MTD installed in its lawn mowers engines manufactured by Defendants  
13 Briggs & Stratton, American Honda Motor Company, Inc., Kawasaki, The Kohler Company and  
14 Tecumseh. MTD advertises, markets and sells lawn mowers throughout the United States,  
15 including in California.

16 14. Defendant The Toro Company (“Toro”) is a corporation with a corporate  
17 address of 8111 Lyndale Avenue South, Bloomington, Minnesota. Toro manufactures lawn  
18 mowers under the brand names Toro, Lawn-Boy and Exmark. During the Class Period, Toro  
19 installed in its lawn mowers engines manufactured by Defendants Tecumseh, Kawasaki, The  
20 Kohler Company, American Honda Motor Company, Inc., and Briggs & Stratton. Toro  
21 advertises, markets and sells lawn mowers throughout the United States, including in California.

22 15. Defendant American Honda Motor Company, Inc. (“Honda”) is a  
23 subsidiary of Honda Corporation with a corporate address of 4900 Marconi Drive, Alpharetta,  
24 Georgia. During the Class Period, Honda manufactured engines for installation in lawn mowers  
25 sold by Defendants MTD, Deere, Electrolux Home Products, Inc., and Toro. Honda advertises,  
26 markets and sells lawn mowers and lawn mower engines throughout the United States, including  
27 in California.

16. Defendant Electrolux Home Products, Inc. (“Electrolux”) is a corporation with a corporate address of 18013 Cleveland Parkway, Suite 100, Cleveland, Ohio. Electrolux manufactured lawn mowers as American Yard Products (“AYP”). Electrolux also did business as Husqvarna Outdoor Products Inc., and Husqvarna AB until June 2006. AYP produced lawn mowers marketed under the brand names Poulan, Poulan PRO, Weed Eater and Husqvarna. AYP also manufactured lawn mowers for Sears sold under the Sears Craftsman brand. During the Class Period, Electrolux installed in its lawn mowers engines manufactured by Defendants Tecumseh, Kawasaki, The Kohler Company, Honda and Briggs & Stratton. During the Class Period, Electrolux advertised, marketed and sold lawn mowers throughout the United States, including in California. In June 2006, Electrolux’s outdoor products segment was spun-off. A separate entity resulting from the spin-off is known as Husqvarna Outdoor Products, Inc.

17. Defendant Husqvarna Outdoor Products, Inc. (“Husqvarna”) is a company with a corporate address of 1030 Stevens Creek Rd, Augusta, Georgia 30907. Husqvarna manufactures lawn mowers advertised, marketed and sold throughout the United States, including in California. Husqvarna manufactures lawn mowers marketed under the brand names Poulan, Poulan Pro, Weed Eater and Husqvarna, as well as lawn mowers sold under Sears’s Craftsman brand.

18. Defendant The Kohler Company (“Kohler”) is a corporation with headquarters located at 444 Highland Drive, Kohler, Wisconsin 53044. During the Class Period, Kohler manufactured engines for installation in lawn mowers sold by Defendants Deere, Toro, Electrolux, and MTD. Kohler manufactures engines that are installed in lawn mowers advertised, marketed and sold throughout the United States, including in California.

#### **IV. AGENTS AND CO-CONSPIRATORS**

19. The acts alleged against the defendants in this Complaint were authorized, ordered, or done by their officers, agents, employees, or representatives, while actively engaged in the management and operation of defendants' businesses or affairs.

1                   20. Various persons and/or firms not named as defendants herein may have  
2 participated as co-conspirators in the violations alleged herein and may have performed acts and  
3 made statements in furtherance thereof.

4                   21. Each defendant acted as the principal, agent, or joint venturer of, or for,  
5 other defendants with respect to the acts, violations, and common course of conduct alleged by  
6 plaintiffs.

7       **V. FACTUAL ALLEGATIONS**

8                   22. Defendants manufacture, advertise, market and sell lawn mowers and the  
9 engines installed in lawn mowers to consumers throughout the United States, including in  
10 California.

11                   23. Defendants currently sell nearly six million lawn mowers to the public  
12 throughout the United States, including California, per year.

13                   24. During the Class Period, Defendants have used the unit of horsepower to  
14 label, categorize, and market their lawn mowers and lawn mower engines. The higher the actual  
15 horsepower, the more power the engine produces.

16                   25. The more horsepower generated by a lawn mower's engine, the better and  
17 faster the lawn mower is able to perform.

18                   26. Defendants market and offer for sale at higher prices lawn mowers labeled  
19 or otherwise advertised with higher horsepower. The higher the horsepower, the higher the price  
20 Defendants charge. Consumers throughout California, including Plaintiff and members of the  
21 proposed Class, pay more for lawn mowers labeled or otherwise represented by Defendants as  
22 producing higher horsepower.

23                   27. The horsepower of a lawn mower is a material fact, one that is important to  
24 a consumer and is the type of information upon which a buyer would be expected to rely in  
25 making a purchasing decision. Statements of horsepower are factual representations that are likely  
26 to affect the lawn mower purchasing decisions or conduct of consumers, including Plaintiff and  
27 members of the proposed Class. As Defendant Briggs & Stratton's president and CEO, John  
28 Shiely, explained during an April 20, 2006 conference call with shareholders and analysts: "As



1 far as the customers are concerned, it's always been our experience that, you know, more  
2 horsepower is better and that, ultimately that becomes the demand, that becomes what the  
3 customer wants."

4 **A. Defendants' Misrepresentations of Horsepower**

5 28. The horsepower purportedly generated by Defendants' lawn mowers is  
6 identified as a number on labels located on the lawn mowers or on the lawn mowers' engines,  
7 and/or in Defendants' other advertising, including packing materials, owner's manuals, materials  
8 distributed with Defendants' lawn mowers, Defendants' websites, and point-of-sale and other  
9 promotional materials disseminated or caused to be disseminated by or on behalf of Defendants to  
10 the public throughout the United States, including in California.

11 29. Defendants have knowingly misrepresented and significantly overstated the  
12 horsepower of Defendants' lawn mowers and lawn mower engines.

13 30. Throughout the Class Period (January 1, 1994 through the present),  
14 Defendants have knowingly misrepresented the horsepower of Defendants' lawn mowers and  
15 lawn mower engines through statements and representations made and disseminated to the public  
16 in Defendants' advertising, including product labeling, packing materials, owner's manuals,  
17 websites, point-of-sale materials and other promotional materials.

18 31. In fact, the true horsepower of Defendants' engines is significantly less  
19 than the horsepower represented by Defendants in advertising, marketing and selling their lawn  
20 mowers and lawn mower engines to the public.

21 **B. Defendants Market and Sell Lawn Mowers Containing Identical Engines as**  
22 **Different Products at Different Prices – Higher Prices for Falsely Represented**  
23 **Higher Horsepower.**

24 32. Defendants knowingly advertise, market and sell identical engines with  
25 varying horsepower ratings and labels, thereby representing (directly and by implication) that  
26 these identical engines are different. In fact these engines are identical on the basis of  
27 horsepower. Defendants sell these identical, but differently and misleadingly labeled, engines at  
28 different prices—with higher prices for engines falsely labeled with purported higher horsepower.



1 Defendants thereby represent that the products are different when they are not but, rather, contain  
2 identical engines.

3 33. In advertising, marketing and selling such engines, Defendants charge or  
4 cause to be charged a higher price for such identical engines containing a falsely represented  
5 higher horsepower.

6 34. In advertising, marketing and selling such lawn mowers, Defendants  
7 conceal, suppress and fail to disclose the material fact that the lawn mowers contain identical  
8 engines.

9 35. In selling such lawn mowers containing identical engines that produce the  
10 same horsepower as different products and at different prices—higher prices for falsely  
11 represented higher horsepower—Defendants repeatedly misrepresent the horsepower of the  
12 engines and conceal, suppress and fail to disclose material facts, including that such products  
13 contain identical engines and the true, significantly lower horsepower of the engines.

14 **C. Concealment, Suppression and Omissions of Material Facts**

15 36. In advertising, marketing and selling their lawn mowers and lawn mower  
16 engines to the public, Defendants have repeatedly concealed, suppressed and failed to disclose  
17 material information, including the true, significantly lower horsepower of their lawn mowers and  
18 lawn mower engines.

19 37. Defendants' advertising, including labeling, packing materials, owner's  
20 manuals, websites, point-of-sale materials and other promotional materials, conceals, suppresses  
21 and fails to disclose the true, significantly lower horsepower actually produced by Defendants'  
22 lawn mowers and lawn mower engines.

23 38. Defendants published, and caused third party websites to publish,  
24 misleading information regarding lawn mower horsepower in an attempt to conceal and suppress  
25 the material fact of the true lower horsepower of Defendants' products.  
26  
27  
28

1           **D.     Conspiracy to Defraud the Public and to Conceal Defendants' Fraudulent**  
2           **Practices**

3           39.     While knowingly misrepresenting horsepower in advertising, marketing  
4     and selling their own lawn mowers and lawn mower engines to the public, Defendants know that  
5     the other Defendants' lawn mower engines do not produce the horsepower represented by such  
6     other Defendants. Defendants have routinely tested other Defendants' engines and are aware that  
7     the other Defendants also misrepresent the horsepower of their engines and that other Defendants  
8     conceal, suppress and fail to disclose to the public the true, significantly lower horsepower of  
9     their engines.

10          40.     While knowing of the other Defendants' horsepower misrepresentations  
11     and omissions, Defendants agreed to conceal, suppress and fail to reveal the horsepower  
12     misrepresentations and omissions of the other Defendants.

13          41.     Defendants communicated among themselves and agreed and conspired to  
14     conceal and suppress other Defendants' misrepresentations and omissions relating to the  
15     horsepower of other Defendants' lawn mowers and lawn mower engines, while misrepresenting,  
16     significantly overstating the horsepower, and concealing and suppressing the true, significantly  
17     lower horsepower of Defendants' own lawn mowers and lawn mower engines.

18          42.     Defendants have an incentive to hide truthful information about the true,  
19     lower-than-represented horsepower of each other's lawn mowers and lawn mower engines from  
20     the public, since Defendants are all engaging in the false, misleading, and deceptive advertising  
21     and unfair and deceptive trade practices and unlawful conduct set forth in this Complaint.

22          43.     As a result of their conspiracy to conceal truthful horsepower information  
23     and defraud the public, Defendants are able to continue to misrepresent and conceal and suppress  
24     the true horsepower of Defendants' lawn mowers and lawn mower engines sold to Plaintiff and  
25     the public and charge higher prices than they would if not for their misrepresentations and illegal  
26     concerted activity.

**Defendants' Power Labeling Task Force Furthered and Concealed their Fraud**

44. Defendants Deere, Tecumseh, Briggs & Stratton, Kawasaki, MTD, Toro, Honda, Electrolux, and Kohler are all members in a group that they call the "Power Labeling Task Force," which provides Defendants the means, opportunity and cover to meet, discuss, conspire, conceal and further their fraudulent horsepower misrepresentations. The Power Labeling Task Force regularly met at various locations, and agendas of the meetings were distributed in advance of the meetings. After the meetings, minutes and other summaries of the meetings were also distributed to Defendants.

**OPEI Website**

45. In or about 2001, the members of the Power Labeling Task Force, including representatives of Defendants, met and discussed various means by which to conceal horsepower fraud and misrepresent horsepower to the consuming public. One suggestion was to put a "disclaimer"—a statement containing misleading information on horsepower issues designed to confuse the consuming public—on the Outdoor Power Equipment Institute, ("OPEI," an otherwise legitimate organization) website. The disclaimer was titled "Understanding Horsepower" and includes misleading information on horsepower issues.

46. On July 10, 2001, William G. Harley and Patrick W. Curtiss of the OPEI mailed to Defendants a memorandum listing the uniform means by which the Power Labeling Task Force members intended to misrepresent horsepower testing procedures and to conceal Defendants' fraudulent horsepower labeling practices from consumers.

47. The members of the Power Labeling Task Force, which are also members of the OPEI, voted in favor of the proposal, and the OPEI created the webpage containing misleading horsepower information. The webpage continues to be on the OPEI's website. [www.opei.org/consumer/horsepower.asp](http://www.opei.org/consumer/horsepower.asp).

48. Defendants conduct rises above mere fraud. Not only do Defendants lie about the horsepower of their lawn mowers and lawn mower engines, Defendants conspired to conceal these lies and deceive the consuming public by using the website of a legitimate entity.

**The creation of and amendment to SAE J1940**

49. The Society of Automotive Engineers (“SAE”) is a large, well respected, automotive industry organization that creates and publishes engineering standards that are voluntarily followed by manufacturers. Standards are promulgated through committees that include industry members. During the Class Period, Defendants Briggs & Stratton, Kohler, Tecumseh, Kawasaki and Honda were members of the SAE Small Engine & Power Equipment Committee, which is the committee responsible for small engines, including lawn mower engines. Defendant Tecumseh’s employee and agent, Mike Adams, was Chairman, and Defendant Kohler also served in a leadership capacity as the secretary of the SAE Small Engine & Power Equipment Committee through Kohler’s employee and agent Mark Swanson. All five engine manufacturing Defendants became members of the SAE Small Engine & Power Equipment Committee.

50. In the late 1980s, several Defendants became aware of concerns expressed about horsepower fraud. They then took action within the SAE and implemented a “labeling standard” called “SAE J1940” the purpose and effect of which was to conceal horsepower fraud. This labeling standard was an attempt to give Defendants a purportedly legitimate reason for labeling their engines with a horsepower representation different than what their test results achieved and to conceal their conspiracy and illegal acts. There is no legitimate reason for a horsepower labeling standard. Instead, Defendants should label their engines with the actual horsepower achieved by the horsepower test.

51. In or about 2000, The Power Labeling Task Force instructed its members, which were also members of the SAE Small Engine & Power Equipment Committee, to recommend to the rest of the committee that revisions to SAE J1940 be made which would further conceal Defendants’ fraudulent horsepower representations. The Power Labeling Task Force amended, or caused to be amended, the SAE J1940 labeling standard to allow for a “fudge factor” of up to 15% to be added to horsepower labels. The Power Labeling Task Force also concealed the true reasons for the amendments to SAE standards by creating false or misleading explanations for the purpose of, or reasons for, those amendments. Even assuming that

1 Defendants use accurate horsepower testing procedures, the amended SAE J1940 standard  
2 explicitly “permits” Defendants to lie about horsepower to consumers, and then to point to the  
3 labeling standard that they conspired to create through the Power Labeling Task Force as the  
4 fraudulent justification for the overstatement of horsepower. Because the SAE J1940 standard  
5 appears on its face to be a standard of the SAE—an otherwise legitimate association—  
6 Defendants’ fraudulent horsepower labeling practices are given the imprimatur of legitimacy and  
7 its conspiracy is concealed.

8 **Creation of SAE J1995 “gross” horsepower**

9 52. In 1990, Defendants conspired to create another SAE standard to both  
10 conceal horsepower fraud and to give Defendants another means to affirmatively misrepresent  
11 horsepower to the consuming public. In 1990, several Defendants caused to be created, published  
12 and disseminated worldwide SAE J1995, which is a “gross” horsepower testing protocol. “Gross”  
13 horsepower is the theoretical horsepower that an engine could achieve under ideal laboratory  
14 conditions with all of the legally required accessories removed from the engine—such as the air  
15 filter and exhaust mechanism. By causing the creation of SAE J1995, Defendants created a new,  
16 entirely different definition of horsepower for lawn mowers and lawn mower engines that is  
17 deceptive to consumers. Prior to 1990, Defendants used “net” horsepower, which is the  
18 horsepower used in other industries, such as the auto industry.

19 53. “Gross” horsepower is deceptive because by removing the necessary  
20 components, such as exhaust systems and air filters, which drain an engine of power, a higher  
21 horsepower can be achieved in the laboratory than in the field. Of course, no consumer ever uses  
22 a lawn mower without an exhaust, air filter and all of the other necessary parts of an engine.  
23 Further, it is against Federal and California state law to sell a lawn mower without such parts.

24 54. Defendants continue to label their engines today, and at all relevant times,  
25 with gross horsepower in “accordance” with the fraudulently created SAE J1995 standard.  
26 Because Defendants continue to rely on SAE J1995 and continue to use “gross” horsepower  
27 instead of net horsepower, Plaintiff and members of the Class, and future purchasers of  
28 mislabeled lawn mowers, have been injured as a result of this conspiracy.

1           55. Defendants' conspiratorial use of gross horsepower to label their engines is  
2 fraudulent. In labeling their engines, Defendants did not disclose what gross horsepower means,  
3 and never disclose that the horsepower they use to label their engines differs from the horsepower  
4 used by other industries such as the automobile industry.

5                   **Torque power**

6           56. In or about 2004, the Power Labeling Task Force began meeting and  
7 discussing alternative means of labeling horsepower and to further their conspiracy. Defendant  
8 Briggs & Stratton coordinated the research. The research was presented to the members of the  
9 Power Labeling Task Force by Stuart Drake of Kirkland & Ellis, who proposed that Task Force  
10 take action to use alternative labeling practices. The Power Labeling Task Force continued to  
11 meet and discuss alternatives up until at least the day before this litigation was commenced in  
12 state court on June 3, 2004.

13           57. Starting in 2007, several Defendants, including Defendants MTD and  
14 Briggs & Stratton began labeling their lawn mower engines with "torque." Defendant Briggs &  
15 Stratton entered into an indemnity agreement with Defendant MTD whereby Defendant Briggs &  
16 Stratton agreed to indemnify Defendant MTD for claims of fraud arising from the labeling of  
17 lawn mowers and lawn mower engines with "torque." Defendants point to the amended SAE  
18 J1940 standard as the authority that allows them to label with "torque," despite the fact that  
19 engineers assert that "torque" is not an appropriate quantifier of power and should not be used in  
20 power labeling.

21           58. Although Defendants did not begin to use "torque" to label engines until  
22 2007, Defendants rely on the 2002 amendment to SAE J1940 for justification to use torque to  
23 label engines. As such, this conduct demonstrates a continued risk that the Power Labeling Task  
24 Force will take further steps in the future to continue working on means to provide cover to  
25 horsepower fraud.

26                   **Defendant Engine Manufacturers Conspired to Conceal their Fraud**

27           59. Defendants Briggs & Stratton, Kohler and Tecumseh formed a private  
28 group that they called the "Eagle Group" to discuss common issues facing their companies, such

1 as proposed federal and state environmental regulations. The Eagle Group has been a means for  
2 Defendants to discuss horsepower overstatement and proposed methods to conceal their  
3 respective fraud.

4 60. The Eagle Group has met in Wisconsin and Illinois and has existed since at  
5 least 1994. The Eagle Group has appeared at Power Labeling Task Force meetings.

6 **“Most Powerful” Craftsman Conspiracy**

7 61. Since at least the mid-1990s, and at all times during the Class Period,  
8 Defendant Sears has sold Craftsman lawn mowers, which Defendant Sears has touted as the  
9 “most powerful” lawn mowers on the market. Since at least the mid-1990s, and at all times during  
10 the Class Period, Defendants have sold lawn mowers to Defendant Sears, including the lawn  
11 mowers sold under the Craftsman brand.

12 62. Defendants Briggs & Stratton, Kohler, Electrolux and Sears conspired to  
13 deceive consumers by significantly overstating horsepower to the public, as well as concealing  
14 truthful horsepower information from the consuming public. During the Class Period, Sears  
15 marketed, advertised and sold lawn mowers it claimed were the “most powerful” on the market.  
16 Even though Briggs & Stratton sells the same exact engines to other lawn mower manufacturers,  
17 the highest fraudulent horsepower labels are exclusively reserved for lawn mowers sold at  
18 Sears—despite the fact that the horsepower of the Sears Craftsman lawn mower engines, contrary  
19 to Sears’s representations as the “most powerful” engines, is not greater than the same engines  
20 sold by Briggs & Stratton to other lawn mower manufacturers. Briggs & Stratton conspired with  
21 Sears to provide Sears with the exclusive right to the highest fraudulent horsepower labels.

22 63. Defendants Briggs & Stratton, Kohler, Electrolux, and Sears’s conspiracy  
23 allowed Sears to represent to the consuming public that Sears sells “the most powerful” lawn  
24 mower engines in the world. For example, on April 9, 2002, in a news release put on the wires  
25 from its Hoffman Estates, Illinois headquarters, Sears announced that Sears’s “Craftsman has  
26 introduced a propelled, front-wheel-drive lawn mower with a 7 hp Briggs & Stratton engine – the  
27 most powerful lawn mower engine ever built for use at home.” The press release goes on to state  
28 that “[t]he industry’s mightiest mower is joined by the most powerful consumer tractor on the



1 market – the Craftsman 27 hp Kohler Pro Garden Tractor.” This fraudulent misrepresentation has  
2 been transmitted continuously via the Internet since April 9, 2002.

3 64. The representations made by Sears in the April 9, 2002 press release that  
4 was disseminated on the Internet and via the United States mails stating that the “7 horsepower”  
5 Briggs & Stratton engine and the “27 horsepower” Kohler engine are the “most powerful”  
6 engines on the market are patently false and misleading. The advertised Briggs & Stratton engine  
7 produces far less than 7 horsepower. The advertised Kohler engine produces far less than 27  
8 horsepower. Further, the engine that Briggs & Stratton, Electrolux, and Sears knowingly  
9 advertise, including through labeling, marketing, and selling to consumers the “most powerful”  
10 walk-behind lawn mower—the 7 horsepower Briggs & Stratton engine—is the same engine that  
11 is sold to other consumers with horsepower labels less than 7 horsepower. Further, the engine  
12 that Kohler, Electrolux, and Sears knowingly advertise, including through labeling, marketing,  
13 and selling to consumers as the “most powerful” riding lawn mower—the 27 horsepower Kohler  
14 engine—is the same engine that is sold to other consumers with horsepower labels less than 27  
15 horsepower.

16 **E. Defendants Fraudulently Concealed their Continuing Fraud from Discovery**  
17 **by Plaintiff**

18 65. Plaintiff and members of the proposed Class did not know, and had no  
19 reasonable way of knowing, (a) that Defendants, in advertising, marketing and selling their lawn  
20 mowers and lawn mower engines, engaged in the unfair and deceptive acts or practices and other  
21 unlawful conduct set forth in this Complaint; (b) the falsity of Defendants’ material  
22 misrepresentations; or (c) Defendants’ conspiracy to conceal and suppress truthful information  
23 about the actual horsepower of other Defendants’ lawn mowers and lawn mower engines, while  
24 concealing and suppressing truthful information about the actual, significantly lower-than-  
25 represented horsepower of Defendants’ own lawn mowers and lawn mower engines.

26 66. Defendants affirmatively and actively concealed their misrepresentations  
27 and omissions and their conspiracy in order to avoid detection and hide their unlawful conduct  
28 from Plaintiff and the public.

1           67. Defendants' conduct of misrepresenting and concealing material facts  
2 concerning the horsepower of Defendants' lawn mowers and lawn mower engines, and  
3 Defendants' conduct in advertising, marketing and selling lawn mowers containing identical  
4 engines as different products at different prices—higher prices for falsely represented higher  
5 horsepower—without disclosing the material facts that the engines are identical and the true,  
6 significantly lower horsepower of such products, concealed from Plaintiff their causes of action.

7           68. Defendants further concealed their use of the same engines in differently  
8 labeled and differently priced lawn mowers by covering the engines with different shrouds or  
9 covers that typically display a different horsepower number, even though the covered engine is  
10 identical to that contained in lawn mowers with different shrouds or covers (and typically with a  
11 different horsepower label on the shrouds). These shrouds or covers have no effect on  
12 performance of the lawn mower. Defendants use them as fraud covers to falsely represent that  
13 such lawn mowers are different products (with different horsepower ratings), which Defendants  
14 advertise and sell at different prices (higher prices for higher falsely represented horsepower). In  
15 fact, such products are not different, contain identical engines and do not produce the horsepower  
16 represented by Defendants.

17           69. Defendants' actions in causing the amendment of the SAE J1940 labeling  
18 standard further hid their fraud. As a result of the amendments, the SAE J1940 standard provides  
19 that production engines shall develop not less than 85% of the labeled horsepower. The change to  
20 the SAE J1940 standard effected by Defendants provides for a built-in "fudge factor." For  
21 example, an engine is "accurately" labeled under SAE J1940 if its label states it produces 20  
22 horsepower but only produces 17 horsepower when tested. This misleading "fudge factor" alone  
23 is fraudulent, however, Defendants inflate their horsepower ratings even higher than the "fudge  
24 factor."

25           70. Additionally, the amended SAE J1940 standard provides Defendants with  
26 the option of representing the power of their engines on the basis of "torque power." "Torque  
27 power" is not a measure of anything and is a meaningless, fictional value concocted for the sole  
28 purpose of concealment.

1           71. The true purpose of these changes was to provide cover for and conceal  
2 Defendants' fraudulent horsepower misrepresentations and omissions. At meetings attended by  
3 Defendants' representatives, it was made clear that the purpose of these changes was to conceal  
4 Defendants' past fraud, and to allow Defendants to continue their fraudulent labeling practices.

5           72. Defendants' misrepresentations and omissions concerning the horsepower  
6 of Defendants' lawn mowers and lawn mower engines have continued despite the changes to the  
7 SAE J1940 standard effected by Defendants. Defendants misrepresent and overstate the  
8 horsepower of Defendants' lawn mower engines in excess even of the "fudge factor" provided for  
9 in the amended voluntary horsepower labeling standard SAE J1940.

10           73. Defendants met during the Class Period to discuss ways to conceal their  
11 fraud. In June 2003, at an annual board meeting of the OPEI in Colorado Springs, Colorado, John  
12 Jenkins, the President of Defendant Deere, warned representatives of several Defendants that if  
13 the industry did not address the fraudulent horsepower inflation, he would "blow the whistle" on  
14 Defendants' conduct.

15           74. At the foregoing meeting, an executive from Defendant Kohler informed  
16 an executive of Defendant MTD that a proposal would be drafted by the Eagle Group to address  
17 the issue of horsepower inflation and overstatement.

18           75. At the April 2004 meeting of the Power Labeling Task Force, a proposal  
19 was made for Defendants to take advantage of the amended SAE labeling standard to use "torque  
20 power" instead of horsepower in advertising, marketing and selling Defendants' lawn mowers  
21 and lawn mower engines. Defendants proposed using "torque power" in order to conceal their  
22 misrepresentations and omissions concerning horsepower, because torque has a higher numerical  
23 value or number than horsepower and is more confusing to consumers. Changing to "torque  
24 power" was an opportunity for Defendants to further conceal their fraud by using a number that is  
25 meaningless on an objective, engineering basis, and is simply designed to draw attention away  
26 from Defendants' fraudulent conduct involving horsepower misrepresentations and omissions.

1           76. Defendants' unlawful conduct and conspiracy as set forth in this Complaint  
2 is inherently self-concealing. In the exercise of reasonable diligence, the true facts regarding the  
3 Defendants' fraud and conspiracy could not have been discovered.

4           77. Plaintiff and Class members could not and did not detect Defendants  
5 horsepower misrepresentations and omissions. Plaintiff and Class members had no means of  
6 discovering or detecting Defendants' horsepower misrepresentations and omissions. Plaintiff does  
7 not own or have access to testing equipment necessary to test the actual horsepower of  
8 Defendants' lawn mower engines. The testing equipment is virtually impossible for consumers to  
9 find and is cost-prohibitive.

10           78. Plaintiff and members of the Class are under no duty to inquire into the  
11 truthfulness of Defendants' representations, including Defendants' representations concerning the  
12 horsepower of Defendants' lawn mowers and lawn mower engines. In advertising, marketing and  
13 selling Defendants' lawn mowers and lawn mower engines, Defendants owe a duty to Plaintiff,  
14 all Class members and the public to provide truthful, non-deceptive information and to avoid and  
15 refrain from unfair and deceptive, and otherwise unlawful acts and practices, including false or  
16 misleading advertising.

17           79. Defendants also used the OPEI to conceal their fraud by drafting and  
18 having placed on the OPEI's website the "Understanding Horsepower" webpage. Through this  
19 website posting, Defendants concealed their fraud by attempting to conceal any detectable  
20 horsepower shortcomings. While Defendants use gross horsepower to label their engines, the  
21 representations made on the OPEI's website state that factors such as atmospheric conditions  
22 were to blame for the lack of horsepower in their engines. This website posting is misleading and  
23 is designed not to inform consumers, but to conceal Defendants' fraud. Rather than correct their  
24 horsepower misrepresentations, Defendants developed more misrepresentations to conceal their  
25 fraud and conspiracy.

26           80. Plaintiff, in the exercise of due diligence, was not aware of and did not  
27 discover the facts underlying their claims, or facts indicating that Defendants' unlawful conduct  
28

1 caused Plaintiff's harm, until only several weeks before originally filing this action on June 3,  
2 2004.

3 81. Defendants' unlawful practices as described in this Complaint are  
4 continuing in nature.

5 82. Unless enjoined, Defendants' unlawful conduct will continue and Plaintiff  
6 and members of the Class will continue to purchase Defendants' lawn mowers and lawn mower  
7 engines subject to Defendants' unlawful acts and practices set forth in the Complaint.

8 **F. Harm to Plaintiff and Class Members**

9 83. Plaintiff and members of the proposed Class are consumers who have been  
10 injured in their money or property by purchasing Defendants' lawn mowers and lawn mower  
11 engines that were not as represented by Defendants.

12 84. Plaintiff and the members of the proposed Class suffered actual damages in  
13 purchasing lawn mowers that were not as powerful as, and did not contain the horsepower,  
14 represented by Defendants and Plaintiff and members of the proposed Class did not receive the  
15 benefit of their bargains.

16 85. Plaintiff and members of the proposed Class paid more for their lawn  
17 mowers than they would have paid absent Defendants' unlawful conduct.

18 86. As a result of Defendants' unlawful conduct, Plaintiff and members of the  
19 proposed Class were deprived of the opportunity to make informed purchasing decisions based on  
20 truthful information, including, without limitation, not purchasing Defendants' products, or not  
21 paying prices for Defendants' products that were inflated due to Defendants' deceit.

22 87. As a result of Defendants' unlawful conduct, Plaintiff and members of the  
23 proposed Class lost the opportunity to purchase accurately labeled, lower horsepower lawn  
24 mowers and to pay lower prices for such products, rather than the higher prices Defendants  
25 charged or caused to be charged for Defendants' misrepresented products.

26 88. As a result of Defendants' unlawful conduct, Plaintiff and members of the  
27 Class were deprived of the opportunity of making an informed purchasing decision, and were  
28

1 deprived of the opportunity to refuse to do business with companies, such as Defendants, engaged  
2 in fraudulent and deceptive conduct.

3 89. As a proximate result of Defendants' unlawful conduct, Plaintiff and  
4 members of the proposed Class have suffered damages in an amount to be determined at trial.

5 90. Defendants have been unjustly enriched by selling millions of  
6 misrepresented products to the public through systematic fraud and deception.

7 **G. Public Interest and Benefit**

8 91. Plaintiff brings this action on behalf of himself and all similarly situated  
9 persons in the proposed Class for the relief requested as to Plaintiff and Class members and to  
10 promote the public interests in the provision of truthful, non-deceptive information to the public  
11 in order to allow consumers to make informed purchasing decisions, and in protecting Plaintiff  
12 and the public from Defendants' unfair, deceptive and fraudulent practices.

13 92. Defendants' misrepresentations and omissions of material facts and other  
14 unlawful conduct as set forth in this Complaint were effected through Defendants' advertising  
15 directed to Plaintiff and the public at large and disseminated throughout the United States,  
16 including in California.

17 **VI. CLASS ACTION ALLEGATIONS**

18 93. Pursuant to Rule 23(a), (b)(2) and (b)(3), Plaintiff brings this action on  
19 behalf of himself and the members of the following proposed Class:

20 All persons in California who, beginning January 1, 1994 through  
21 the present purchased, for their own use and not for resale, a lawn  
22 mower containing a gas combustible engine up to 30 horsepower  
provided that either the lawn mower or the engine of the lawn  
mower was manufactured or sold by a Defendant.

23 94. Excluded from the Class are (i) each Defendant, any entity in which a  
24 Defendant has a controlling interest or which has a controlling interest in any Defendant, and  
25 Defendants' legal representatives, predecessors, successors and assigns; (ii) governmental  
26 entities; (iii) Defendants' employees, officers, directors, agents, and representatives and their  
27 family members; and (iv) the Judge and staff to whom this case is assigned, and any member of  
28 the Judge's immediate family.

1           95.     Members of the proposed Class are so numerous that the individual joinder  
2 of all absent Class members is impracticable. While the exact number of Class members is  
3 unknown to Plaintiff at this time, it is ascertainable by appropriate discovery. Plaintiff is informed  
4 and believes, based upon the nature of the trade and commerce involved, that the proposed Class  
5 includes millions of Class members in California.

6           96.     There are questions of law or fact common to the members of the Class and  
7 such common questions predominate over questions affecting individual members. Among the  
8 questions of law or fact common to the applicable proposed Class are:

9                   a.     Whether Defendants misrepresented the horsepower produced by  
10 the engines in the lawn mowers manufactured or sold by Defendants to Plaintiff and members of  
11 the Class;

12                   b.     Whether Defendants concealed, suppressed and failed to disclose  
13 truthful information concerning the horsepower produced by the engines manufactured or sold by  
14 Defendants in lawn mowers sold to Plaintiff and members of the Class;

15                   c.     Whether Defendants' representations and omissions regarding the  
16 horsepower produced by lawn mowers and lawn mower engines manufactured or sold by  
17 Defendants involved representations and omissions of material facts;

18                   d.     Whether Defendants advertised and sold lawn mowers containing  
19 identical engines as different products at different prices (higher prices for falsely represented  
20 higher horsepower), without disclosing the fact that the engines contained in such products are  
21 identical;

22                   e.     Whether Defendants' conduct as set forth in this Complaint violates  
23 the California Business and Professions Code;

24                   f.     Whether Defendants' conduct as set forth in this Complaint violates  
25 the California Consumers Legal Remedies Act;

26                   g.     Whether Defendants' misrepresentations, omissions and other  
27 conduct set forth in this Complaint occurred in the course of trade or commerce and/or in the  
28 conduct of business;



1 h. Whether Defendants conspired to conceal and suppress truthful  
2 information about the actual, significantly lower-than-represented horsepower of other  
3 Defendants' lawn mowers and lawn mower engines;

4 i. Whether Plaintiff and members of the proposed Class have been  
5 injured by Defendants' conduct;

6 j. Whether Plaintiff and the members of the proposed Class are  
7 entitled to damages;

8 k. Whether Plaintiff and the members of the proposed Class are  
9 entitled to punitive damages and other monetary relief as provided under state law;

10 l. Whether Defendants were unjustly enriched as a result of  
11 Defendants' conduct set forth in this Complaint;

12 m. Whether Defendants conspired to defraud the public and engaged in  
13 the unlawful acts or practices in furtherance of the conspiracy as set forth in this Complaint;

14 n. Whether injunctive relief is appropriate; and

15 o. Whether Plaintiff is entitled to recover costs and expenses incurred  
16 in prosecuting this action and reasonable attorneys' fees.

17 97. Plaintiff's claims are typical of the claims of the Class. Plaintiff and  
18 members of the proposed Class all purchased lawn mowers containing engines manufactured and  
19 sold by Defendants. Plaintiff and the members of the proposed Class have all suffered damages as  
20 a result of Defendants' common conduct and fraudulent scheme, including Defendants'  
21 horsepower misrepresentations and omissions and other unlawful conduct set forth in this  
22 Complaint.

23 98. Plaintiff will fairly and adequately protect the interests of the proposed  
24 Class. Plaintiff has no interest adverse to the interests of the members of the proposed Class.  
25 Plaintiff has retained competent counsel who has extensive experience in prosecuting consumer  
26 fraud and complex Class action litigation.

1           99. The prosecution of separate actions by individual members of the Class  
2 would create a risk of inconsistent or varying adjudications, establishing incompatible standards  
3 of conduct for Defendants.

4           100. Defendants have acted or refused to act on grounds generally applicable to  
5 the Class. Declaratory and injunctive relief with respect to the Class is appropriate.

6           101. The questions of law or fact common to members of the proposed Class  
7 predominate over any individual questions affecting only individual Class members. Each of the  
8 members of the proposed Class purchased a lawn mower that was not as represented due to  
9 Defendants' misrepresentations of, and concealment, suppression and failure to disclose the  
10 actual, significantly lower horsepower of the lawn mower and lawn mower engine. The issues of  
11 fact and law applicable to the Class are identical to the issues of fact and law applicable to each  
12 individual member of the proposed Class.

13           102. A Class action is an appropriate method for the fair and efficient  
14 adjudication of this controversy and Class action treatment is superior to the alternatives. There is  
15 no special interest in the members of the Class individually controlling the prosecution of  
16 separate actions. The damages sustained by individual Class members will not be large enough to  
17 justify individual actions, especially in proportion to the tremendous costs and expenses necessary  
18 to prosecute this action. The expense and burden of individual litigation makes it impossible for  
19 members of the Class individually to address the wrongs done to them. Class treatment will  
20 permit the adjudication of claims of Class members who could not afford individually to litigate  
21 their claims against Defendants. Further, as a result of Defendants' concealment, millions of  
22 Californians remain unaware that they have been injured and will not be aware of Defendants'  
23 fraud, or the extent and nature of their injury, in the absence of this Class action. Class treatment  
24 will permit a large number of similarly situated persons to prosecute their common claims in a  
25 single forum simultaneously, efficiently and without the duplication of effort and expense that  
26 numerous individual actions would entail. No difficulties are likely to be encountered in the  
27 management of this Class action that would preclude its maintenance as a Class action, and no  
28 superior alternative exists for the fair and efficient adjudication of this controversy. Furthermore,

1 Defendants transact substantial business in California and throughout the United States.

2 Defendants will not be prejudiced or inconvenienced by the maintenance of this Class action in  
3 this forum.

4 **VII. VIOLATIONS ALLEGED**

5 **COUNT 1**

6 **Violations of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750, et. seq.**

7 103. Plaintiff Carl Phillips realleges and incorporates all prior paragraphs of this  
8 Complaint.

9 104. The California Consumer Legal Remedies Act, Cal. Civ. Code §  
10 1770(a)(5) and (7) (2006), provides, in part, as follows:

11 (a) The following unfair methods of competition and unfair or  
12 deceptive acts or practices undertaken by any person in a  
13 transaction intended to result or which results in the sale or lease of  
goods or services to any consumer are unlawful:

14 . . .

15 (5) Representing that goods or services have sponsorship, approval,  
16 characteristics, ingredients, uses, benefits or quantities which they  
do not have . . .;

17 . . .

18 (7) Representing that goods or services are of a particular standard,  
19 quality, or grade, or that goods are of a particular style or model, if  
they are of another.

20 105. Defendants' business practices, in advertising, marketing and selling their  
21 lawn mowers and lawn mower engines, of misrepresenting and overstating the horsepower of  
22 their lawn mowers and lawn mower engines, when, in fact, the actual horsepower of Defendants'  
23 lawn mowers and lawn mower engines is less than as represented by Defendants, constitute  
24 multiple, separate violations of Cal. Civ. Code § 1770(a)(5) and (7) (2006), including:

25 a. Falsely representing that Defendants' lawn mowers and lawn  
26 mower engines have characteristics, uses, benefits or quantities of producing the represented  
27 horsepower, when, in fact, they do not; and  
28

1                   b.       Falsely representing that Defendants' lawn mowers and lawn  
2 mower engines are of a particular standard, quality or grade in producing the horsepower  
3 represented by Defendants, when, in fact, they are not and do not.

4                   106.   Defendants' business practices, in advertising, marketing and selling their  
5 lawn mowers and lawn mower engines while misrepresenting the horsepower of such products, of  
6 failing to disclose, concealing, suppressing or omitting material information concerning the true,  
7 lower horsepower of their lawn mowers and lawn mower engines, constitute multiple, separate  
8 violations of Cal. Civ. Code § 1770(a)(5) and (7) (2006).

9                   107.   Defendants' business practices of advertising, marketing and selling lawn  
10 mowers containing identical engines that produce the same horsepower as different products at  
11 different prices (higher prices for falsely represented higher horsepower), while misrepresenting  
12 the horsepower of such products and concealing, suppressing or omitting material facts, including  
13 the facts that such products contain identical engines and the true, lower horsepower of such  
14 products, constitute multiple, separate violations of Cal. Civ. Code § 1770(a)(5) and (7) (2006),  
15 including:

16                   a.       Falsely representing that such lawn mowers have characteristics,  
17 uses, benefits, or quantities, including that they are different products and that they produce the  
18 represented horsepower, when, in fact, they are not and do not; and

19                   b.       Falsely representing that such lawn mowers are of a particular  
20 standard, quality, grade or style, including that they are different products and that they produce  
21 the represented horsepower, when, in fact, they are not and do not.

22                   108.   Plaintiff and members of the Class are consumers, as defined by Cal. Civ.  
23 Code § 1761(d) (2006), in that they purchased lawn mowers from Defendants for personal, family  
24 or household purposes.

25                   109.   Defendants engaged in the unfair or deceptive acts or practices set forth in  
26 this Complaint in transactions intended to result, and which did result, in the sale of goods or  
27 services to consumers, including Plaintiff and members of the Class.  
28

110. In advertising, marketing and selling Defendants' lawn mowers and lawn mower engines, Defendants made the material misrepresentations and omissions set forth in this Complaint in Defendants' advertising, including labeling, packing materials, owner's manuals, Websites, point-of-sale materials and other promotional materials disseminated in California by or on behalf of Defendants.

111. Defendants' misrepresentations and omissions set forth in this Complaint are material in that they relate to matters that would likely affect the purchasing decisions or conduct of consumers, including Plaintiff and members of the Class, regarding Defendants' products.

112. Defendants' advertising, including labeling and other promotional materials, caused Plaintiff and Class members to purchase Defendants' lawn mowers and lawn mower engines.

113. Plaintiff and members of the Class have been injured in their money or property by Defendants' unfair or deceptive acts or practices set forth in this Complaint.

114. As a result of Defendants' violations of Cal. Civ. Code § 1770, Plaintiff Phillips and members of the Class are entitled to injunctive relief and any other relief the court deems proper, pursuant to California law, including Cal. Civ. Code § 1780(a).

115. Pursuant to Cal. Civ. Code § 1782, Plaintiff, by his undersigned counsel, provided written notice to Defendants at least thirty days prior to filing this Complaint and demanded that Defendants correct or otherwise rectify their unlawful conduct, which Defendants have failed to do despite such notice.

## COUNT 2

### **False Advertising in Violation of California Business & Professions Code § 17500**

116. Plaintiff Carl Phillips realleges and incorporates all prior paragraphs of this Complaint.

117. Cal. Bus. & Prof. Code § 17500, provides, in part, as follows:

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or

1 otherwise, or anything of any nature whatsoever or to induce the  
2 public to enter into any obligation relating thereto, to make or  
3 disseminate or cause to be made or disseminated before the public  
4 in this state, or to make or disseminate or cause to be made or  
5 disseminated from this state before the public in any state, in any  
6 newspaper or other publication, or any advertising device, or by  
7 public outcry or proclamation, or in any other manner or means  
8 whatever, including over the Internet, any statement, concerning  
9 that real or personal property or those services, professional or  
10 otherwise, or concerning any circumstance or matter of fact  
11 connected with the proposed performance or disposition thereof,  
12 which is untrue or misleading, and which is known, or which by the  
13 exercise of reasonable care should be known, to be untrue or  
14 misleading, or for any person, firm, or corporation to so make or  
15 disseminate or cause to be so made or disseminated any such  
16 statement as part of a plan or scheme with intent not to sell that  
17 personal property or those services, professional or otherwise, so  
18 advertised at the price stated therein, or as so advertised. . . .

118. Defendants' advertisements for its lawn mowers and lawn mower engines  
11 contain untrue or misleading statements concerning the horsepower of Defendants' advertised  
12 products in that the actual horsepower of Defendants' lawn mowers and lawn mower engines is  
13 less than as represented by Defendants.

119. Defendants' advertisements for its lawn mowers and lawn mower engines  
15 contain untrue or misleading statements concerning the horsepower of Defendants' advertised  
16 products in that, while misrepresenting the horsepower of Defendants' lawn mowers and lawn  
17 mower engines, Defendants have failed to disclose, concealed, suppressed or omitted material  
18 facts, including the true, lower horsepower produced by Defendants' lawn mowers and lawn  
19 mower engines.

120. Defendants' advertisements for lawn mowers containing identical engines  
21 that produce the same horsepower but are represented as different products offered and sold at  
22 different prices (higher prices for falsely represented higher horsepower) and as containing the  
23 horsepower represented by Defendants, contain untrue or misleading statements, and fail to  
24 disclose, conceal, suppress or omit material facts, in that the advertised lawn mowers are not  
25 different products, contain identical engines and do not produce the horsepower represented by  
26 Defendants.

121. Defendants knew, or in the exercise of reasonable care, should have known that the statements, representations and omissions set forth in this Complaint were untrue and/or misleading.

122. Defendants' conduct of misrepresenting and overstating the horsepower of their lawn mowers and lawn mower engines in Defendants' advertising disseminated in California constitutes multiple, separate violations of Bus. & Prof. Code § 17500.

123. Defendants' conduct in failing to disclose, concealing, suppressing or omitting material facts, including the true, lower horsepower of Defendants' lawn mowers and lawn mower engines in Defendants' advertising disseminated in California constitutes multiple, separate violations of Bus. & Prof. Code § 17500.

124. Defendants' conduct in advertising in California Defendants' lawn mowers containing identical engines that produce the same horsepower and representing such products as different products offered and sold at different prices (higher prices for falsely represented higher horsepower), without disclosing the material fact that the lawn mowers contain identical engines, and misrepresenting and failing to disclose, concealing, suppressing or omitting the true, lower horsepower of such engines, constitutes multiple, separate violations of Bus. & Prof. Code § 17500.

125. In advertising, marketing and selling Defendants' lawn mowers and lawn mower engines, Defendants made the material misrepresentations and omissions set forth in this Complaint in Defendants' advertising, including labeling, packing materials, owner's manuals, Websites, point-of-sale materials and other promotional materials disseminated in California by or on behalf of Defendants.

126. Defendants' misrepresentations and omissions set forth in this Complaint are material in that they relate to matters that would likely affect the purchasing decisions or conduct of consumers, including Plaintiff Phillips and members of the Class, regarding Defendants' products.



127. Defendants' advertising, including labeling and other promotional materials, caused Plaintiff and Class members to purchase Defendants' lawn mowers and lawn mower engines.

128. Plaintiff Phillips and members of the Class have been injured in their money or property as a result of Defendants' false or misleading advertising practices as set forth in this Complaint.

129. As a result of Defendants' false or misleading advertising, Plaintiff Phillips and members of the Class are entitled to damages, injunctive relief, restitution and disgorgement of all monies obtained by means of Defendants' unlawful conduct, interest, and attorneys' fees and costs.

### COUNT 3

#### **Violations of the California Business & Professions Code § 17200, et seq.**

130. Plaintiff Carl Phillips realleges and incorporates all prior paragraphs of this Complaint.

131. California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, defines unfair competition to include:

any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

132. Defendants' business practices, in advertising, marketing and selling their lawn mowers and lawn mower engines, of misrepresenting and overstating the horsepower of their lawn mowers and lawn mower engines, when, in fact, the actual horsepower of Defendants' lawn mowers and lawn mower engines is less than as represented by Defendants, are:

a. Unlawful, as proscribed by Cal. Bus. & Prof. Code § 17500 (2006), in that Defendants' advertisements contain unfair, deceptive, untrue or misleading statements of material fact which were and are known by Defendants, or which by the exercise of reasonable care should be known, to be untrue or misleading and, thus, constitute multiple, separate violations of Cal. Bus. & Prof. Code § 17200;

1                   b.       Fraudulent business practices and, thus, constitute multiple,  
2 separate violations of Cal. Bus. & Prof. Code § 17200, in that members of the public are likely to  
3 be deceived by Defendants' acts and practices into believing a material fact, i.e., that Defendants'  
4 lawn mowers and lawn mower engines produce the horsepower represented by Defendants when,  
5 in fact, they do not; and

6                   c.       Unfair business practices and, thus, constitutes multiple, separate  
7 violations of Cal. Bus. & Prof. Code § 17200, because they offend the public policy of California,  
8 are unethical, oppressive, unscrupulous or substantially injurious to consumers or, alternatively,  
9 the harm caused by Defendants' actions outweighs any benefits accruing from such actions.

10               133.   Defendants' business practices, in advertising, marketing and selling their  
11 lawn mowers and lawn mower engines while misrepresenting the horsepower of such products, of  
12 failing to disclose, concealing, suppressing or omitting material facts, including the true, lower  
13 horsepower of their lawn mowers and lawn mower engines, are:

14                   a.       Unlawful, as proscribed by Cal. Bus. & Prof. Code § 17500, in that  
15 Defendants' advertisements contain unfair, deceptive, untrue or misleading statements which  
16 were and are known by Defendants, or which by the exercise of reasonable care should be known,  
17 to be untrue or misleading and, thus, constitute multiple, separate violations of Cal. Bus. & Prof.  
18 Code § 17200;

19                   b.       Fraudulent business practices and, thus, constitutes multiple,  
20 separate violations of Cal. Bus. & Prof. Code § 17200, in that members of the public are likely to  
21 be deceived by Defendants' acts and practices into believing that Defendants' lawn mowers and  
22 lawn mower engines produce the horsepower represented by Defendants when, in fact, they do  
23 not; and

24                   c.       Unfair business practices and, thus, constitutes multiple, separate  
25 violations of Cal. Bus. & Prof. Code § 17200, because they offend the public policy of California,  
26 are unethical, oppressive, unscrupulous or substantially injurious to consumers or, alternatively,  
27 the harm caused by Defendants' actions outweighs any benefits accruing from such actions.  
28

1                   134. Defendants' business practices of advertising, marketing and selling lawn  
2 mowers containing identical engines that produce the same horsepower as different products at  
3 different prices (higher prices for falsely represented higher horsepower), while misrepresenting  
4 the horsepower of Defendants' products and failing to disclose, concealing, suppressing or  
5 omitting material facts, including the facts that such products contain identical engines and the  
6 true, lower horsepower of such products, are:

7                   a. Unlawful, as proscribed by Cal. Bus. & Prof. Code § 17500, in that  
8 Defendants' advertisements contain unfair, deceptive, untrue or misleading statements which  
9 were and are known by Defendants, or which by the exercise of reasonable care should be known,  
10 to be untrue or misleading and, thus, constitute multiple, separate violations of Cal. Bus. & Prof.  
11 Code § 17200;

12                   b. Fraudulent business practices and, thus, constitutes multiple,  
13 separate violations of Cal. Bus. & Prof. Code § 17200, in that members of the public are likely to  
14 be deceived by Defendants' acts and practices into believing that such lawn mowers are different  
15 products and produce the horsepower represented by Defendants when, in fact, they contain  
16 identical engines and do not produce the horsepower represented by Defendants; and

17                   c. Unfair business practices and, thus, constitute multiple, separate  
18 violations of Cal. Bus. & Prof. Code § 17200, because they offend the public policy of California,  
19 are unethical, oppressive, unscrupulous or substantially injurious to consumers or, alternatively,  
20 the harm caused by Defendants' actions outweighs any benefits accruing from such actions.

21                   135. In advertising, marketing and selling Defendants' lawn mowers and lawn  
22 mower engines, Defendants made the material misrepresentations and omissions set forth in this  
23 Complaint in Defendants' advertising, including labeling, packing materials, owner's manuals,  
24 Websites, point-of-sale materials and other promotional materials disseminated in California by  
25 or on behalf of Defendants.

26                   136. Defendants' misrepresentations and omissions set forth in this Complaint  
27 are material in that they relate to matters that would likely affect the purchasing decisions or  
28

1 conduct of consumers, including Plaintiff Phillips and members of the Class, regarding  
2 Defendants' products.

3 137. Defendants' advertising, including labeling and other promotional  
4 materials, caused Plaintiff and Class members to purchase Defendants' lawn mowers and lawn  
5 mower engines.

6 138. Plaintiff Phillips and members of the Class have been injured in their  
7 money or property as a result of Defendants' unlawful, unfair, or fraudulent business acts or  
8 practices and unfair, deceptive, untrue or misleading advertising, as set forth in this Complaint.

9 139. As a result of Defendants' violations of Cal. Bus. & Prof. Code § 17200, et  
10 seq. Plaintiff Phillips and members of the Class are entitled to damages, restitution and  
11 disgorgement of all monies obtained by Defendants by means of Defendants' unlawful practices,  
12 injunctive relief, interest, and attorneys' fees and costs, pursuant to California law.

#### 13 **COUNT 4**

##### 14 **Unjust Enrichment and Disgorgement of Profits**

15 140. Plaintiff Carl Phillips realleges and incorporates all prior paragraphs of this  
16 Complaint.

17 141. Defendants have been unjustly enriched through overpayments by Plaintiff  
18 and Class members and the resulting profits enjoyed by Defendants as a direct result of such  
19 overpayments. Plaintiff's detriment and Defendants' enrichment were related to and flowed from  
20 the conduct challenged in this Complaint.

21 142. Under California's common law principles of unjust enrichment,  
22 Defendants should not be permitted to retain the benefits conferred via overpayments by Plaintiff  
23 and members of the Class.

24 143. Plaintiff and members of the Class seek disgorgement of all profits  
25 resulting from such overpayments and establishment of a constructive trust from which Plaintiff  
26 and Class members may seek restitution.

**COUNT 5****Civil Conspiracy**

144. Plaintiff Carl Phillips realleges and incorporates all prior paragraphs of this Complaint.

145. Defendants know that other Defendants' lawn mower engines do not produce the horsepower represented by such other Defendants. Such knowledge derives, in part, from Defendants' testing of other Defendants' engines and from communications, meetings and conferences between and among Defendants as set forth in this Complaint. Defendants are aware that the other Defendants misrepresent and overstate the horsepower of their lawn mowers and lawn mower engines and that other Defendants conceal, suppress and fail to disclose to the public the true, lower horsepower of their products.

146. Despite knowing of the other Defendants' horsepower misrepresentations and omissions, Defendants agreed among and between themselves and conspired to conceal and suppress truthful information about the actual, lower-than-represented horsepower of other Defendants' lawn mowers and lawn mower engines, and to conceal and suppress truthful information that would expose other Defendants' misrepresentations, overstatements and omissions relating to the horsepower of other Defendants' lawn mowers and lawn mower engines, while concealing and suppressing truthful information about the actual, lower-than-represented horsepower of Defendants' own lawn mowers and lawn mower engines.

147. In furtherance of the conspiracy, Defendants actively concealed and suppressed truthful information concerning the actual horsepower of other Defendants' lawn mowers and lawn mower engines and concealed and suppressed truthful information that would expose other Defendants' misrepresentations, overstatements and omissions relating to the horsepower of other Defendants' lawn mowers and lawn mower engines, while continuing to misrepresent, significantly overstate and conceal and suppress information concerning the actual, lower horsepower of Defendants' own lawn mowers and lawn mower engines. Defendants acted for the common purpose and design of avoiding detection, earning revenue from advertising and

1 selling products that were not as represented to the public, and concealing their unlawful conduct  
2 from Plaintiff, the Class and the public.

3 148. As set forth in this Complaint, Defendants committed unlawful acts or  
4 practices in furtherance of the conspiracy, including:

5 a. Concealing and suppressing truthful information about the actual,  
6 lower-than-represented horsepower of other Defendants' lawn mowers and lawn mower engines  
7 and concealing and suppressing truthful information that would expose other Defendants'  
8 misrepresentations, overstatements and omissions relating to the horsepower of other Defendants'  
9 lawn mowers and lawn mower engines, while continuing to misrepresent, overstate and conceal  
10 and suppress information concerning the true, lower-than-represented horsepower of Defendants'  
11 own lawn mowers and lawn mower engines;

12 b. Amending, or causing to be amended, the amendment of the  
13 voluntary industry standard SAE J1940 in order to conceal Defendants' past horsepower  
14 misrepresentations and omissions and to allow Defendants to continue, and continue to conceal,  
15 their horsepower misrepresentations and omissions;

16 c. Concealing and suppressing the fraudulent, deceptive purpose of  
17 the amendments to the SAE standard and creating false or misleading explanations for the  
18 adoption or purpose of those amendments; and

19 d. Engaging in the unfair and deceptive acts and practices set forth in  
20 this Complaint, in violation of the California statutory consumer laws.

21 149. Defendants conspired and acted in furtherance of the conspiracy for the  
22 common purpose of perpetuating Defendants' fraudulent horsepower inflation scheme in order to  
23 maximize profits from the advertising and sale of Defendants' lawn mowers and lawn mower  
24 engines that were not as represented by Defendants. Defendants' horsepower inflation scheme is  
25 dependent upon each Defendant's concealment and suppression of truthful information  
26 concerning other Defendants' horsepower misrepresentations and overstatements and the  
27 concealment and suppression of the true, lower-than-represented horsepower of other Defendants'  
28 products, thereby allowing each Defendant to continue to misrepresent, overstate and conceal and

1 suppress truthful information concerning the actual, lower horsepower contained in Defendants'  
2 own lawn mowers and lawn mower engines.

3 150. Defendants' unlawful conduct set forth in this Complaint was done as part  
4 of a conspiracy to deceive and mislead Plaintiff and members of the public in violation of the  
5 California consumer laws.

6 151. As a proximate result of Defendants' conspiracy, and Defendants' tortious,  
7 unlawful conduct in furtherance of the conspiracy, Plaintiff and members of the Class have been  
8 injured and have suffered damages, including paying for products that were not as represented by  
9 Defendants, and paying more for such products than Plaintiff and members of the Class would  
10 have paid in the absence of Defendants' conspiracy.

11 152. Plaintiff and members of the Class seek recovery of damages, in an amount  
12 to be determined at trial, caused by Defendants' conspiracy and Defendants' unlawful acts in  
13 furtherance of their conspiracy to defraud Plaintiff and the public.

14 153. In doing the things herein alleged, Defendants acted with malice and with  
15 fraud, willfully and with the intent to cause injury to the Plaintiff and the Class he seeks to  
16 represent. Defendants were therefore guilty of fraud and conscious disregard of Plaintiff's and  
17 the Class's rights, thereby warranting an assessment of punitive damages in an amount  
18 appropriate to punish Defendants and to deter others from engaging in similar misconduct.

19 **VIII. REQUEST FOR RELIEF**

20 WHEREFORE, Plaintiff respectfully requests that the Court award judgment,  
21 jointly and severally, against Defendants as follows:

22 A. Entering an order certifying this action as a Class action, properly brought  
23 by Plaintiff on behalf of the Class, as defined in this Complaint; certifying Plaintiff as  
24 representative of the Class; and appointing Plaintiff's counsel as counsel for the Class;

25 B. Declaring that Defendants' acts and practices as set forth in this Complaint  
26 constitute multiple, separate violations the above California statutory consumer laws;

27 C. Enjoining Defendants from engaging in the unlawful acts and practices set  
28 forth in this Complaint and from further violations of California statutory consumer laws and



1 common law;

2 D. Enjoining Defendants from misrepresenting to the consuming public any  
3 power rating regarding their engines or lawn mowers;

4 E. Awarding Plaintiff and the members of each Class actual, compensatory  
5 damages in an amount to be determined at trial;

6 F. Awarding Plaintiff and members of the Class exemplary or punitive  
7 damages as provided by law;

8 G. Ordering Defendants to disgorge to Plaintiff and the members of the Class  
9 all monies unjustly received through Defendants' unlawful conduct;

10 H. Awarding restitution to Plaintiff and members of the Class as provided by  
11 law;

12 I. Awarding Plaintiff and members of the Class pre-judgment and post-  
13 judgment interest as provided by law;

14 J. Awarding Plaintiff and the Class costs and reasonable attorneys' fees as  
15 provided by law; and

16 K. Granting Plaintiff and the Class such other and further relief as the Court  
17 finds just and proper.

18 **DEMAND FOR JURY TRIAL**

19 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands  
20 a jury trial as to all issues so triable.

21 Dated: May \_\_\_, 2008

22 By: \_\_\_\_\_

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